Nos. 49, 53, and 54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, ET AL., *Appellants*

v.

ELVIN L. REDDISH, ET AL., *Appellees*

INTERSTATE COMMERCE COMMISSION, ET AL., *Appellant*

v.

ELVIN L. REDDISH, ET AL., *Appellees*

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL., *Appellant*

v.

ELVIN L. REDDISH, ET AL., *Appellees*

On Appeals From the United States District Court for the Western District of Arkansas, Fort Smith Division

BRIEF FOR CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC.

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OPINIONS BELOW

The opinion of the statutory three judge District Court (R. 398) is reported at 188 F. Supp. 160. The report of the Interstate Commerce Commission (R. 385) is published at 81 M.C.C. 35.

JURISDICTION

The final judgment and order of the District Court was entered on October 19, 1960 (R. 411). Probable jurisdiction was noted on all appeals on April 17, 1961 (R. 421), and Nos. 49, 53 and 54 were consolidated. Jurisdiction of this Court to review the final judgment and order of the District Court is conferred by 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

The National Transportation Policy, 54 Stat. 899, 49 U.S.C. preceding sections 1, 301, 901 and 1001; section 203(a)(15) of the Interstate Commerce Act; 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong.; and section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-412, Public Law 85-163, 85th Cong., are set forth in the Appendix.

STATEMENT OF THE CASE

The Contract Carrier Conference will not make a separate statement of the case, but relies upon the statement of appellee Elvin L. Reddish.

QUESTIONS PRESENTED

1. Whether, under the 1957 amendments to section 203 (a)(15) and 209(b) of the Interstate Commerce Act, the Commission may, in passing upon applications for contract carrier permits, base its determination on the willingness and ability of common carriers to render the proposed service.

2. Whether the specific criteria set forth in section 209(b) of the Act represent a change in the standards for determining consistency with the public interest and the national transportation policy and whether the Commission improperly interpreted and applied these criteria.

3. Whether, in determining the distinct needs of the shipper under section 203(a)(15) and in weighing the effect which granting the permit would have upon the services of the protesting carriers against the effect which denying the permit would have upon the shipper under section 209(b), the Commission may disregard lower costs inherent in a proposed contract carrier service, particularly where because of this factor the shippers' choice must be between private and contract carriage.

SUMMARY OF ARGUMENT

This is the second decision of a three judge District Court reversing the Commission's interpretation of the 1957 amendments to sections 203(a)(15) and 209(b) of the Interstate Commerce Act. Both courts agreed that these amendments were intended to draw a sharper distinction between contract and common carriers and to provide the Commission with specific criteria to be considered in determining whether a proposed contract carrier service was consistent with the public interest and the national transportation policy.

The legislative history of the amendments indicate that Congress did not intend that the Commission should determine the propriety of issuing contract carrier permits on the basis of the willingness and ability, or lack thereof, of a common carrier to render the proposed service. As applied by the Commission there is no difference in a willingness and ability test and an adequacy of existing service test. Neither are relevant considerations in passing upon contract carrier applications.

In this proceeding the Commission also failed to give proper consideration to the lower costs inherent in the proposed contract carrier service. The shippers have been engaged in private carriage and intend to continue this operation if the service here proposed is not authorized, because they consider the less-than-truckload rates of com-

mon carriers to be prohibitive. The inherent advantages of contract carriers is a factor to be considered, particularly where failure to do so presents the shipper with no alternative but to continue private carrier operations.

ARGUMENT

I. IN PASSING UPON AN APPLICATION FOR A CONTRACT CARRIER PERMIT UNDER SECTION 309(b) OF THE INTERSTATE COMMERCE ACT THE WILLINGNESS AND ABILITY OF COMMON CARRIERS IS NOT A RELEVANT CONSIDERATION

The issues in this proceeding are substantially the same as those raised in *Interstate Commerce Commission* v. *J. T. Transport Company, Inc., et al.*, and *U.S.A.C. Transport, Inc., et al.* v. *J-T Transport Company, Inc., et al.*, Nos. 17 and 18.

The Court below reversed the Interstate Commerce Commission in this proceeding as did the District Court in *J. T. Transport Co., Inc.*, v. *United States, and Interstate Commerce Commission*, 185 F. Supp. 838 (W.D. Mo., 1960). Thus two statutory three judge District Courts, representing a total of five justices, agree that the Commission may not consider the willingness and ability of common carriers to perform the proposed service.

In the instant proceeding the District Court in discussing this question stated (R. 407):

> "Our study of the legislative history of this Act convinces us that the deletion of the willingness and ability test was at the specific protest of the contract carriers, some of their supporting shippers, the Department of Commerce and the Department of Justice. In its place were substituted the five specifications of items to be considered by the Commission in determining whether the requested permit would be consistent with the public interest and the national transportation policy, and to this change the Interstate Commerce Commission expressed its approval. S. Rep. No. 703, 85th Cong., 1st Sess. (1957) (Report of Senate Committee on bill which became Public Law

85-163, 71 Stat. 411). See, *J-T Transport Co., Inc., Extension—Columbus, Ohio*, 79 M.C.C. 695, 711 (Concurring opinion, Walrath, Commissioner) (1959)."

The Court also found (R. 408):

> "We do not believe that it was the intent of Congress that the approval or disapproval of an application for a contract carrier permit should be determined solely by reference to whether or not the proposed service is provided by common carriers, or one which they are unwilling or unable to provide. Sufficient tests and safeguards to control the granting of contract carrier permits are contained in the law to protect common carriers without the imposition by the Commission of a test which Congress deemed improper."

This view is in accord with that expressed by the Court in the *J-T Transport* case, *supra*. The Contract Carrier Conference has argued this point extensively in its brief in Nos. 17 and 18, and rather than repeating this material here, we respectfully refer the Court to that discussion.

II. THE CRITERIA SET FORTH IN SECTION 209(b) OF THE ACT REPRESENT A CHANGE IN THE STANDARDS FOR DETERMINING CONSISTENCY WITH THE PUBLIC INTEREST AND THE NATIONAL TRANSPORTATION POLICY AND DO NOT INCLUDE AN ADEQUACY OF EXISTING SERVICE TEST

This issue is also a major part of the argument of the Contract Carrier Conference in its brief in the *J-T Transport* case, and we ask that the Court refer to the discussion contained therein. We would point out, however, that again two District Courts agreed that the Commission had improperly applied the criteria of section 209(b), and that there is no difference between the willingness and ability test and the adequacy of service test. The Court below stated (R. 407-408):

> "We do not believe that there is any difference between the 'willingness and ability' test deleted by Congress from the bill proposed by the Commission and the 'adequacy of service' test which the Commission

said it applied in this case—a separate test, it maintains, from the one deleted. We believe that the Commission's own opinion in this case shows that it did apply the 'willingness and ability' test:

> 'Applicant argues in his reply (referring to the 1957 amendments) that the willingness and ability of common carriers to provide needed service should be given but little weight in determining whether an application for contract carrier authority should be granted. Similar contentions were considered by the entire Commission in No. MC-11195 (Sub No. 100) J-T Transport, Inc., Extension—Columbus, Ohio, M.C.C., decided June 15, 1959; these issues were there resolved in a manner contrary to that urged by applicant; and it was found that the availability of common carrier service is a relevant matter which must be considered in disposing of contract carrier applications.'"

The Court also stated that as applied by the Commission in this case there is no distinction between the adequacy test and and the test of proving public convenience and necessity that must be met by applicants for a common carrier certificate (R. 405).

III. THE COMMISSION MAY NOT DISREGARD LOWER COSTS INHERENT IN A PROPOSED CONTRACT CARRIER SERVICE. PARTICULARLY WHERE BECAUSE OF THIS FACTOR THE SHIPPER MUST CHOOSE BETWEEN PRIVATE AND CONTRACT CARRIAGE

The factual situation presented here differs in part from that in the *J-T Transport* case, *supra*. Most of the traffic involved has previously moved in private carriage. The shippers consider the less-than-truckload rates of common carriers prohibitive. In their judgment they cannot use the services of common carriers for small shipments because of the cost involved. If Reddish does not obtain authority to perform the required service, the shippers will continue to use private carriage without resorting to further common carrier service (R. 390-391).

The foregoing facts are recited in the Commission's findings. The only logical conclusion which can be drawn from these facts with respect to the third and fourth criteria in section 209(b) is that (1) the granting of the application can have no adverse effect on the services of protesting carriers, and (2) denial of the permit will deprive the shippers of a service responsive to their distinct needs. It should not have been necessary here to engage in a presumption, as the Commission did in the *J-T Transport* case, that loss of potential traffic would adversely affect protesting carriers, for the evidence shows that they will not receive this traffic if the application is denied inasmuch as the shippers intend to continue the use of private carriage in this event. The District Court found (R. 410):

> "Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the report, which establishes, we think, not only that the protestant common carriers have not handled this traffic but would not handle it if the permit were denied."

Both here and in its brief in the *J-T Transport* case,[1] the Commission relies on language from *American Trucking Associations* v. *United States*, 364 U.S. 1, 18, 80 S. Ct. 1570, 1580 as suggesting that assertions by shippers that they would not tender traffic to protesting carriers would allow shippers to dictate the Commission's power. So far as we can see, this language relates only to the appellants' standing to maintain the action in that case and does not carry the significance attached to it by the Commission.

The Commission also contends that it has made a permissible judgment on the record before it, and that in overturning that judgment the Court made findings based on its own evaluation of the evidence thereby substituting its

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[1] Commission's main brief, p. 26.

judgment for that of the Commission. We disagree entirely with this contention. We find no indication that the Court attempted to re-evaluate the evidence. It simply found that the Commission had misapplied the statute, and, among other things, should have considered the lower cost of service in determining the effect which denying the permit would have upon the shippers.

The Commission's disregard for the shippers' requirement for transportation at a price comparable to private carriers ignores the existence of one of the factors which distinguish contract carriage from common carriage by motor vehicle. Contract carriage under the Act as amended in 1957, is and was intended to be a service inherently different than that performed by common carriers. In Sen. Rep. No. 703, 85th Cong., 1st Sess. (1957), which recommended passage of the 1957 amendments, the Committee states (pp. 6-7):

> "Common and contract carriage are unlike; the degrees of regulation applicable to them are unequal; their functions in our national transportation system are unlike. These inherent differences are such as require statutory language clearly capable of being administered and interpreted so as properly to reflect these differences."

As this Court recognized in *Schaffer Transportation Company* v. *United States*, 355 U.S. 83, 89, 78 S. Ct. 173, 177 (1957):

> "Viewing these conclusions in light of the National Transportation Policy we find at the outset that there has been no evaluation made of the 'inherent advantages' of the motor service proposed by the applicant. That policy requires the Commission to administer the Act so as to 'recognize and preserve the inherent advantages' of each mode of transportation."

The Court was there considering rail service as distinguished from motor carrier service which are decidedly

separate modes of transportation. Whether or not contract carriage should be considered a separate mode of transportation, we believe that the National Transportation Policy, particularly in view of the 1957 amendments to sections 203(b) and 209(b) of the Act, contemplates the protection of such inherent advantages as they may have, including lower costs. Furthermore, the National Transportation Policy is designed to promote economical service, and where a contract carrier can offer a more economical service this fact should be considered in deciding the effect which a denial of the permit would have upon the shipper, as well as whether such service meets the distinct needs of the shipper.

The Commission avoids the issue by citing its own precedents holding that the level of rates is not a proper matter for consideration in application proceedings for motor common or contract authority. The justification for this position is said to be that if the rates of existing carriers are unjust or unreasonable, appropriate relief is available under other provisions of the Act. *Carl Subler Trucking, Inc.—Southern States*, 77 M.C.C. 707, 713. It may be that under a public convenience and necessity standard, provided by statute in the case of a common carrier and often applied to contract carriers as a practice of the Commission, rate levels as such are not directly involved unless they are so high as to constitute an embargo on the traffic. Under the 1957 amendments, however, lower costs resulting from a contract carrier operation whether in the form of rates or otherwise, are appropriate for consideration, and that the District Court committed no error in so finding.

It is clear that the shippers here consider common carrier costs on less-than-truckload traffic to be prohibitive and that they intend to continue to engage in private carriage unless this application is granted. That they have done so in the past is a valid indication that they will do so in the future. As a result, common carriers will not

receive the traffic[2] and the shippers will not receive the benefits of a low cost equivalent of private carriage which is inherent in the proposed contract carrier service. The Commission refused to give appropriate consideration to these factors, and its failure to do so contributed to its general misinterpretation of the statute.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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[2] Significantly in *Caledonia Lines, Inc., Extension—Utica, N. Y.*, No. MC-108313 (Sub No. 7), Division 1, July 31, 1961, the Commission in granting a contract carrier application stated:

> "A grant of the requested authority will not deprive protestants of any traffic they now handle. Moreover, it is not likely that protestants would be tendered any of the involved traffic if the instant application were denied."

APPENDIX

Statutes Involved

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding Sections 1, 301, 901, and 1001, provides as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transpqrtation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August 22, 1957, 71 Stat. 411, Public Law 85-163, 85th Cong., provides as follows:

> Sec. 203. (a) As used in this part—
>
> • • • • •

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 Stat. 411-12, Public Law 85-163, 85th Cong., provides as follows:

Sec. 209.

* * * * *

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a

permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carriers shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.